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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 520

VIRDO CUDD,

Appellant,

vs.

GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS THIS APPEAL.
CERTIFICATE OF SERVICE.

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GALE A. MATHERS, Judge of the Ninth Judicial Circuit of the State of Illinois,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS THIS APPEAL.

Appellee, Gale A. Mathers, Judge of the Ninth Judicial Circuit of the State of Illinois, moves this Court to dismiss this appeal because:

I.

The Supreme Court of Illinois has made it clear that denial of leave to file a petition for an original writ of *mandamus* does not constitute any adjudication upon the merits.

II.

The real party in interest, Lee H. Van Tuyl, defendant in the personal injury suit in which the questions sought to be presented arose, was not a party to this case in the Supreme Court of Illinois, is not a party to this appeal and has not been served with notice of appeal.

III.

This appeal presents no substantial Federal questions.

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SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION.

I.

The Supreme Court of Illinois has made it clear that denial of leave to file a petition for an original writ of mandamus does not constitute any adjudication upon the merits.

The Supreme Court of Illinois holds that its order denying leave to file an original petition for a writ of *mandamus* is not an adjudication of any question tendered by the petition sought to be filed and does not comport or intimate any decision upon the merits. In *Monroe* v. *Collins*, 393 Ill. 542, the court, holding that its previous denial of leave to file an original petition for a writ of *mandamus* intimated no expression upon the merits of the cause embodied in the petition sought to be filed, said at pages 556 and 557:

> "What does an order of this court denying an application for leave to file an original action really adjudicate? In the first place, the procedure in making the application and the order of denial does not include the fundamentals of parties and a decision on the merits, which are necessary that a judgment possess before it may be pleaded in bar of a subsequent action. The making of the application and its consideration by this court are *ex parte*. The persons who are to be defendants, if leave to file is granted, are not in court on such application and have no opportunity to resist it. It is clear that if an application for leave to file should be allowed, there would be nothing in the order allowing it that would operate as a bar to the defenses any defendant might interpose. In other words, the order allowing it to be filed is not an adjudication on the merits of the cause of action stated in the complaint or petition. On the other hand, an order denying leave to file is not an adjudication on the merits of the cause of action stated in the pleadings, nor can an order of

> denial operate to estop the plantiff or petitioner from prosecuting an action for the same relief in another court."

Appellant says at page 2 of his Jurisdictional Statement:

> "There is jurisdiction to entertain an appeal from the judgment of the highest court of a State in its original proceeding to deny or award a writ of *mandamus* or other writ to compel the action or non-action of state judicial or other officers."

The statement is correct but has application only to cases where there is a judgment. In this case there was no judgment, there has been no decision as to any Federal constitutional question and therefore there is no jurisdiction of this appeal.

II.

The real party in interest, Lee H. Van Tuyl, defendant and counterclaimant in the personal injury suit in which the questions sought to be presented arose, was not made a party to this appeal and has not been served with notice of appeal.

As appears from the Appellant's Statement of the Case, appellant's application to the Supreme Court of Illinois was for leave to file an original petition for the court's writ of *mandamus* to compel appellee, as Judge of the Ninth Judicial Circuit of the State of Illinois, to expunge from the records of his court certain interrogatories, orders and other proceedings requiring appellant to disclose in a personal injury suit pending in appellee's court information as to whether appellant was the holder of a policy of public liability insurance and if so, its coverage. The defendant and counterclaimant in that personal injury suit was one Lee H. Van Tuyl. He was not made or sought to be made a

party to the petition for *mandamus* that appellant asked leave to file in the Supreme Court of Illinois. Nor has he been served with notice of appeal in this case.

If the order of the Supreme Court of Illinois were otherwise applicable, which it is not, because it does not import adjudication (See Point I, *ante*), Van Tuyl would be a real and indispensable party in interest. If substantial constitutional questions were presented by this appeal, which they are not (see Point III, *post*), Van Tuyl would be directly interested in their decision and adversely affected by the decision of those questions if the decision should be in appellant's favor. He was not made a party to the application for leave to file a petition for *mandamus* and has not been made an appellee in this matter.

The Attorney General of Illinois concedes that in original proceedings for writs of *mandamus* in the Supreme Court of Illinois to compel the expunction of judicial orders, it has been the practice to implead only the judge who entered the orders, not adverse parties to the litigation in which the orders were entered. Whether the practice of compelling the expunction of orders without the presence of real parties in interest as to such orders comports with due process of law has never been passed upon by the Supreme Court of Illinois so far as our research discloses.

But this Court's jurisdiction depends upon having before it the real parties to the controversy sought to be adjudicated or at least their privies and representatives. Van Tuyl, defendant and counterclaimant in the personal injury suit out of which the questions sought to be presented to this Court arose, is an indispensable party to but is absent from this appeal. For this reason the appeal should be dismissed.

III.

This appeal presents no substantial Federal question.

There is indeed a diversity of judicial opinion as to whether a party to an action for personal injuries may be compelled by the process of discovery to disclose the existence and, if existent, the coverage of public liability insurance. The opposing cases are collected and discussed in *People ex rel. Terry* v. *Fisher*, 12 Ill. 2d 224. In the *Terry* case the Supreme Court of Illinois sustained the propriety of a trial court's order compelling such disclosure.

But whatever may be the diversity of opinion as to the propriety of compelling disclosure of public liability insurance, there is no substantial Federal constitutional question presented where, as the Supreme Court of Illinois recognized in the *Terry* case, the State's substantive law is such as to "confer an interest in such a policy on every member of the public that is negligently injured."

The Supreme Court of Illinois said in the *Terry* case, (12 Ill. 2d 231), at pages 237 and 238:

> "Section 388 of the Insurance Code (Ill. Rev. Stat. 1955, chap. 73, par. 1000,) requires certain standard provisions to be included in liability policies affording injured persons a right of action against the insurer if execution against the insured is returned unsatisfied; section 58(k) of the Motor Vehicle Act (Ill. Rev. Stat. 1955, chap. 95½, par. 58k,) provides certain minimum liability insurance coverage for motor vehicles; and section 16 of the Truck Act (Ill. Rev. Stat. 1953, chap. 95½, par. 253,) requires motor carriers to have specified liability insurance policies before permits may be issued. Moreover, we have construed section 388 of the Insurance Code to be declarative of the public policy of this State to protect persons injured by the negligent operation of motor vehicles, and as conferring rights which cannot be defeated after the accident by the con-

certed action of the insured and the insurer. (*Scott* v. *Freeport Motor Casualty Co.*, 392 Ill. 332.) It is clear that the legislature by virtue of the foregoing enactment, has placed liability insurance in a category distinct from the insured's other assets so far as persons injured by the negligent operation of his motor vehicle are concerned."

The Supreme Court of Illinois further said in the *Terry* case at page 239:

"In determining whether liability insurance is discoverable by pretrial interrogatories, we must also take cognizance of the role of insurance companies in such litigation against their insured, for as Justice Holmes noted, 'Judges need not be more naive than other men.' Inasmuch as the insurance company is virtually substituted as a party, (*Maddox* v. *Grauman*, 265 S.W. 2d 939; dissent in *Jeppesen* v. *Swanson*, 243 Minn. 547, 68 N.W. 2d 649, 658,) as far as the investigation and conduct of the defense is concerned, it would seem to be relevant, if not indispensable, that plaintiff's attorney have knowledge of the existence of insurance in order to prepare for the case he has to meet and be apprised of his real adversary. Such knowledge, furthermore, would also lead to more purposeful discussions of settlement, and thereby effectuate the dispatch of court business. This aspect is most significant in terms of effective judicial administration in coping with today's congested dockets which are largely attributable to the increasing volume of personal injury litigation."

It thus appears that whatever may be the rule in other jurisdictions, Illinois' *substantive law* is such as to vest in one injured by the operation of an automobile on Illinois highways an interest in the terms as well as in the proceeds of a public liability policy. This substantive interest may of course be the basis for discovery.

Nor is there any infringement of appellant's constitutional right of access to Illinois courts by conditioning such right of access upon disclosure of material or relevant facts.

including the fact of existence or non-existence of public liability insurance. Nothing is more ancient than judgment of dismissal or upon failure to file a pleading or other document in accordance with the governing law of the sovereign in whose courts litigation is pending. The right to dismissal or default for refusal to respond to an adversary pleading is of the very essence of due process of law.

Appellant suggests that a rule penalizing failure to disclose public liability insurance by striking his pleadings creates an "arbitrary presumption", which "invidiously discriminates against appellant" that "all his pleadings are so false that they may be stricken." No such presumption is involved. The penalty of dismissal or default is regularly imposed for failure to file such pleadings as are required by law. The fact that, technically, disclosure of insurance is denominated "discovery" and not a "pleading" does not raise any constitutional question.

Appellant's suggestion that he is deprived of due process or equal protection because disclosure interferes with his asserted private "right of private ownership" over his policy of insurance is answered by the Illinois substantive law, declared in the *Terry* case, that there is no such private right. Injured persons are third party beneficiaries of automobile public liability insurance in Illinois.

Appellant suggests that the "fairness of the trial of the initial question of appellant's liability" may be "contaminated" by "public inquiry" as to the existence of public liability insurance. There are two answers to this suggestion:

First, many matters are elicited by discovery that would not be admissible in evidence and, if admitted, would be gravely prejudicial. This Court's own Federal Rules of Civil Procedure provide for examination "regarding any

matter, not privileged, which is relevant to the subject matter involved in the action" and that "it is not a ground for objection that the testimony will be inadmissible in the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Under this rule, for example, heresay statements that would be gravely prejudicial may be elicited if the inquiry might lead to the names of witnesses whose testimony as to the matters inquired of would not be hearsay. There is no presumption that matters elicited by discovery will find their way to members of the jury.

Second, Illinois' substantive law might provide for direct joinder of an insurance carrier as a party. *A fortiori*, Illinois may adopt the less drastic measure of compelling disclosure of insurance in a manner not calculated to expose such disclosure to the jury.

Appellant's suggestion that compulsory disclosure of the existence and extent of public liability coverage denies equal protection in that it discriminates against holders of such insurance may be thus briefly answered:

First: For the reasons stated by the Supreme Court of Illinois in the *Terry* case and noted above, public liability insurance is, in that court's language, "in a category distinct from the insured's other assets so far as person injured by the negligent operation of his motor vehicle are concerned."

Second: The requirement of compulsory disclosure applies to all holders of public liability insurance.

Finally, the considerations developed above dispose of appellant's contention that compulsory disclosure of public liability insurance involves an unreasonable search and seizure.

It is respectfully submitted that no substantial Federal question is tendered by this appeal.

Wherefore appellee prays that this appeal may be dismissed.

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CERTIFICATE OF SERVICE.

I, Raymond S. Sarnow, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 5th day of December, 1958, I served five copies of this Motion to Dismiss this Appeal upon Vird O. Cudd, Appellant, by mailing five copies in duly addressed envelopes, with first class postage prepaid to the Attorneys of record as follows:

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